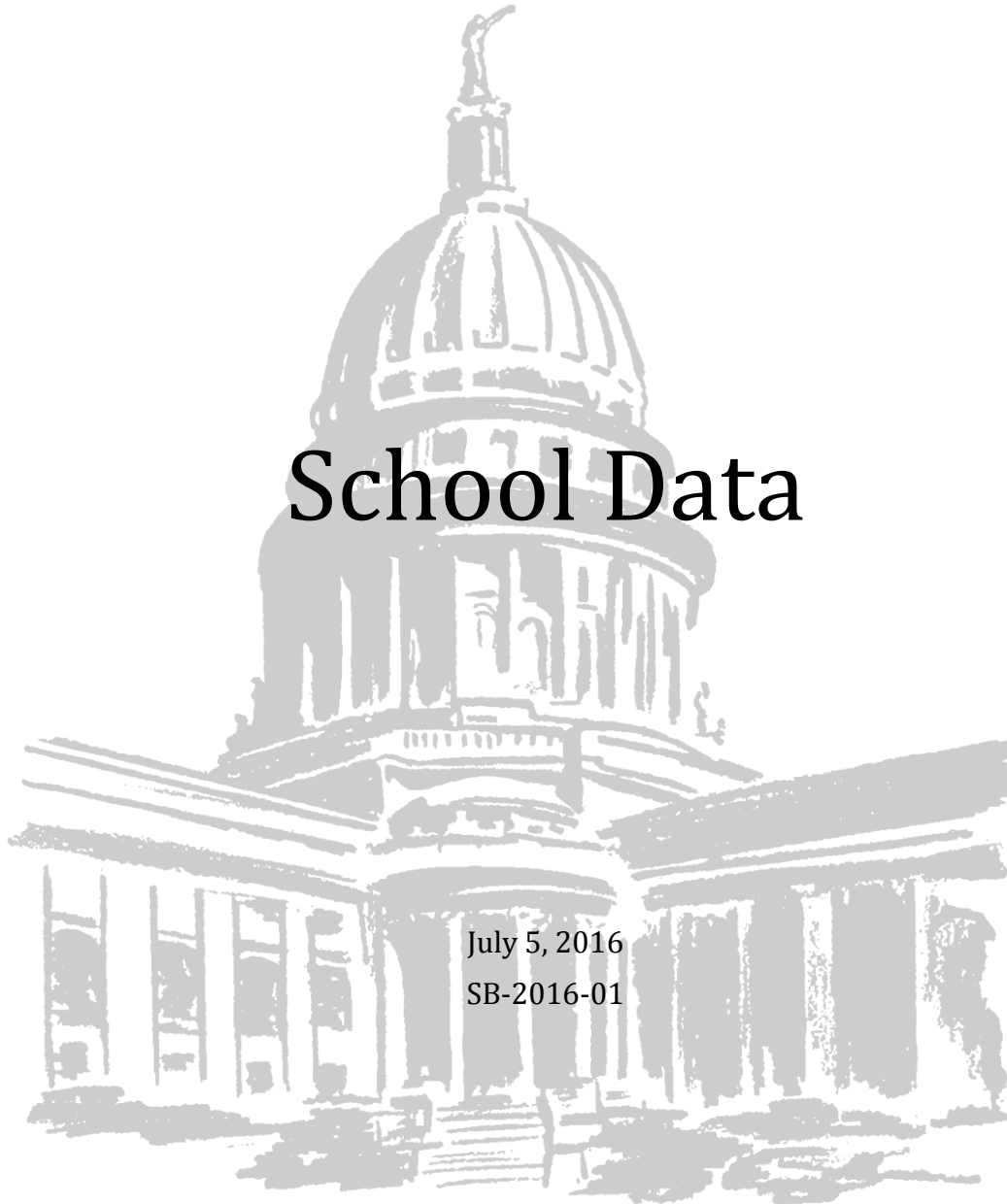


Staff Brief

School Data



July 5, 2016

SB-2016-01

Wisconsin Legislative Council
One East Main Street, Suite 401
Madison, WI 53703-3382
Phone: (608) 266-1304
Fax: (608) 266-3830

www.legis.wisconsin.gov/lc

INTRODUCTION

Federal and state laws provide overlapping and complimentary protections for student data and records maintained by educational institutions and agencies. These laws ensure the privacy of pupil records and guarantee students and their parents the right to access records. Local policies developed by school districts also impact the treatment and confidentiality of pupil records.

This Staff Brief provides an overview of the principal federal and state laws protecting the privacy of student information and pupil records. These laws define pupil records and prohibit their disclosure for purposes other than those specifically identified and authorized.

- **Part I** addresses privacy protections for student data and records under federal law. The Part summarizes the Family Educational Rights and Privacy Act (FERPA), summarizes the Protection of Pupil Rights Amendment (PPRA), and references other federal laws impacting the privacy of student data.
- **Part II** addresses privacy protections for student data and records under state law. The Part summarizes the Wisconsin Pupil Records Law, summarizes the statute establishing the Statewide Student Data System, and references other state laws impacting the privacy of student data.

This Staff Brief was prepared by Katie Bender-Olson, Senior Staff Attorney, and Brian Larson, Staff Attorney.

PART I – FEDERAL LAW PRIVACY PROTECTIONS FOR STUDENT DATA

Federal law protects the privacy of student data and pupil records through the Family and Educational rights and Privacy Act (FERPA). Federal law also imposes limitations on surveys and evaluations which may reveal personal information about students through the Protection of Pupil Rights Amendment (PPRA).

The following Part summarizes FERPA and the PPRA, and references other federal laws impacting the privacy of student data.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

FERPA gives parents and eligible students the right to access certain school records, ask for amendments to school records in certain cases, and control the disclosure of certain information in school records. FERPA was enacted in 1974. [20 U.S.C. 1232g.] Regulations for administering the law are promulgated by the U.S. Department of Education (DoED). [See 34 C.F.R. Part 99.]

FERPA applies to educational agencies or institutions that receive funds from programs administered by DoED. These include state educational agencies (SEAs), such as the Wisconsin Department of Public Instruction (DPI); public K-12 schools; school districts or other local educational agencies (LEAs); postsecondary institutions such as colleges and universities; and certain other DoED-funded institutions. Parochial and private schools at the elementary and secondary levels generally are not subject to FERPA. Private postsecondary institutions often receive DoED funding and are subject to FERPA. [34 C.F.R. § 99.1.]

Categories of School Records and Information

Records

Under FERPA, a “record” is defined to mean any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. [34 C.F.R. § 99.3.]

Directory Information

“Directory information” is defined to mean information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. FERPA specifies that “directory information”:

- **Includes** a student's name; address; telephone listing; email address; photograph; date and place of birth; major field of study; grade level; enrollment status; dates of attendance; participation in officially recognized activities; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

- **Does not include** a student's social security number or any student identifier that could be used to access education records without a separate authentication.

[34 C.F.R. § 99.3.]

Education Records

“Education records” is defined to mean records that are directly related to a student and maintained by an educational agency or institution. However, FERPA specifies that “education records” **do not include**:

- Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- Records of a law enforcement unit of an educational agency or institution.
- Employment records made and maintained by an educational agency or institution in the normal course of business.
- Records on a student that are made or used by a health care provider in connection with the treatment of the student.
- Certain records relating to former students that are not made or used in connection with their attendance as a student.
- Grades on peer graded papers before they are have collected and recorded by a teacher.

[34 C.F.R. § 99.3.]

Personally Identifiable Information

FERPA specifies that “personally identifiable information” includes:

- A student's name.
- The name of the student's parent or other family members.
- The address of the student or student's family.
- A personal identifier, such as the student's social security number, student number, or biometric record.
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name.
- Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.

- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

[24 C.F.R. § 99.3]

Parents and Eligible Students

Until a student becomes 18 years old, FERPA rights are exercised by the student's parents. "Parent" means a parent of a student, and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. FERPA rights accrue to custodial and noncustodial parents alike unless otherwise specified in a court order, state statute, or other legally binding document. [34 C.F.R. §§ 99.3 to 99.4.]

After a student becomes 18 years old, or enters a postsecondary institution at any age, FERPA rights accrue to the student, then referred to as an "eligible student." [34 C.F.R. §§ 99.3 to 99.5.]

Opportunity to Inspect and Review Education Records

FERPA gives parents and eligible students the opportunity to inspect and review the student's education records. An educational agency or institution must comply with a request for access to education records within a reasonable period of time, which cannot exceed 45 days. If records contain information on more than one student, the parent or eligible student making the request may be informed of only the specific information about that student. The agency or institution may not destroy any education records subject to an outstanding request for inspection and review. [34 C.F.R. §§ 99.10 (a)-(b) and (e), 99.12.]

Educational agencies and institutions are not required to provide copies of records unless circumstances effectively prevent the requester from reviewing the records. In most cases, FERPA permits the agency or institution to charge a fee for a copy of a record made for the parent or student, but not to search for or retrieve records. [34 C.F.R. §§ 99.10 (d), 99.11, and 99.12.]

FERPA also provides that an educational agency or institution must respond to reasonable requests for explanations and interpretations of education records. [34 C.F.R. § 99.10 (c).]

A SEA, such as DPI, is considered to be an educational agency or institution for purposes of FERPA's requirements related to inspection and review of education records. [34 C.F.R. § 99.10 (a).]

If a parent or eligible student believes an education record relating to the student is inaccurate or misleading, or in violation of the student's rights to privacy, they may ask for the record to be amended or changed. The agency or institution must decide within a reasonable period of time whether to amend the record as requested. If an amendment is denied, the agency or institution must provide an opportunity for a hearing at which the decision may be appealed, at the request of the parent or eligible student. [34 C.F.R. § 99.20 to 99.22.]

Disclosure of Personally Identifiable Information

Generally, schools must have written permission from the parent or eligible student prior to disclosure of personally identifiable information from the student's education records. The consent must identify the records to be disclosed, the purpose of the disclosure, and the identity or class of people to whom the disclosure may be made. However, FERPA permits disclosure of such information without consent under certain conditions, including:

- To other school officials with a legitimate educational interest, or to a school to which the student is transferring.
- To specified officials for audit or evaluation purposes under a written agreement.
- To comply with a judicial order or lawfully issued subpoena, or to appropriate officials in cases of health or safety emergencies.

An educational agency or institution, or authorized third party, may also release records that previously contained personally identifiable information, after the removal of all such information. Prior to the release of the record, the educational agency or institution or other party must make a reasonable determination that a student's identity is not personally identifiable under the circumstances. [34 C.F.R. §§ 99.30 to 99.31.]

Directory Information

FERPA includes a special rule for directory information, which the law treats separately from other education records. If an educational agency or institution which a student attends has given public notice to parents and eligible students of a policy regarding disclosure of directory information, the agency or institution may disclose directory information without consent, in accordance with the policy. FERPA requires the inclusion of a procedure allowing parents and students to opt-out of the disclosure of directory information without consent. [34 C.F.R. § 99.37.]

Miscellaneous Provisions

Enforcement

Enforcement of FERPA occurs when a parent or student files a complaint alleging that a violation of the Act has occurred. The law does not create a private right of action in court, but instead, a parent or student may file a complaint with DoED's Family Policy Compliance Office (FPCO) for investigation. If there is a violation, FPCO may identify steps that the agency or institution may take to comply, and must give the agency or institution reasonable time in which to voluntarily comply. Ultimately, if the DoED Secretary determines that compliance has not occurred, federal DoED funding may be reduced or terminated. [34 C.F.R. §§ 99.66 to 99.67.]

Annual Notification Requirement

An educational agency or institution which a student attends must provide parents or eligible students an annual notification regarding their rights under FERPA. The notice must inform them of the right to inspect and review education records and to seek amendment of records believed to be inaccurate. The notice must also inform parents and eligible students of the

right to consent to disclosures of education records, except to the extent disclosure is authorized without consent. Also, the notice must provide them with information about how to file a complaint with FPCO concerning potential violations. [34 C.F.R. § 99.7.]

Recording Requests and Disclosures of Student Information

An educational agency or institution generally must record each request for access to and each disclosure of personally identifiable information from the education records of a student. Each record of a request or disclosure must be maintained with the education record as long as the education record itself is maintained. [34 C.F.R. § 99.32.]

PROTECTION OF PUPIL RIGHTS AMENDMENT (PPRA)

PPRA imposes requirements related to certain surveys, analyses, or evaluations in which students participate. PPRA was enacted 1978. [20 U.S.C. 1232h.] Regulations for administering the law are promulgated by DoED. [See 34 C.F.R., Part 98.]

Availability of Instructional Materials

PPRA requires educational agencies and institutions that receive funds from programs administered by DoED, SEAs such as DPI, and LEAs such as school districts, to make certain instructional materials available for inspection by parents and eligible students. This requirement applies to materials used in connection with a DoED-funded survey, analysis, or evaluation in which the student will participate. [34 C.F.R. § 98.3.]

Consent to Participation

PPRA also requires educational agencies and institutions to obtain written consent from a parent before a minor student may be required to participate in a DoED-funded survey, analysis, or evaluation that reveals information concerning:

- Political affiliations.
- Mental or psychological problems potentially embarrassing to the student and their family.
- Sexual behavior and attitudes.
- Illegal, antisocial, self-incriminating, and demeaning behavior.
- Critical appraisals of other individuals with whom respondents have close family relationships.
- Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers.
- Religious practices, affiliations, or beliefs.

- Income, other than as authorized by law to determine eligibility for participation in certain programs.

[34 C.F.R. § 98.4.]

OTHER FEDERAL LAWS

In addition to FERPA and PPRA, other federal laws that may impact data security measures protecting student privacy include the following:

- **Federal Drug and Alcohol Patient Records Confidentiality Law**. The law specifies that drug and alcohol treatment records related to students are covered by confidentiality restrictions administered by the U.S. Department of Health and Human Services (DHHS). [See 42 C.F.R., Part 2.]
- **Health Insurance Portability and Accountability Act (HIPAA) of 1996**. HIPAA provides privacy regulations to protect patients by limiting the ways that health care providers and other covered entities can use patient medical information. Certain HIPAA administrative requirements may apply when health care is delivered in a school setting. However, the Privacy Rule of HIPAA provides a broad exemption for personal health information maintained in education records, which is protected under FERPA. [See 45 C.F.R., Parts 160, 162, and 164; see also DoED and DHHS, November 2008, *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records*, Section V (“Frequently Asked Questions and Answers”).]
- **Richard B. Russell National School Lunch Act (NSLA)**. NSLA restricts the release of eligibility and services information regarding participants in the federal free and reduced-price lunch program. [See 7 C.F.R., Part 210.]
- **Individuals with Disabilities Education Act (IDEA)**. IDEA protects the rights of individuals with disabilities. It includes rights regarding inspection, review, release, and disclosure of educational records of students subject to the law. In general terms, these IDEA provisions are similar to those under FERPA. [See 34 C.F.R., Part 300.]
- **Children’s Online Privacy Protection Act of 1998 (COPPA)**. COPPA protects the privacy of children using the Internet. The law imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on other online operators with actual knowledge they are collecting personal information from a child under 13. [See 16 C.F.R., Part 312.]

PART II – STATE LAW PRIVACY PROTECTIONS FOR STUDENT DATA

State law protects the privacy of student data and pupil records through the Wisconsin Pupil Records Law. The law permits certain disclosures of student data, but limits the particular student information that can be disclosed, the individuals who may access it, and the purposes for which it may be used. State law also authorizes the creation of a statewide student data system and permits the use of student data for research purposes, pursuant to agreements that meet statutory requirements.

The following Part summarizes the Wisconsin Pupil Records Law, discusses the law establishing the Statewide Student Data System, and references other state laws impacting the privacy of student data.

WISCONSIN PUPIL RECORDS LAW

Wisconsin law contains a statute specifically protecting the privacy of student records, which is commonly referred to as the Wisconsin Pupil Records Law. [s. 118.125, Stats.] The Wisconsin Pupil Records Law generally requires that all student records maintained by a public school be kept confidential and requires that school boards adopt policies to maintain the confidentiality of pupil records. The law does, however, create exceptions allowing for the release of student records under specified circumstances.

Format of Records

The Wisconsin Pupil Records Law protects records stored in many different formats. Under the law, a record is defined as any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics. [s. 118.125 (1) (e), Stats.] Thus, protections for pupil records cover materials such as video clips, emails, and audio recordings, in addition to more traditional paper documents and computer files.

Categories of Student Records

The Wisconsin Pupil Records Law identifies different categories of student records and creates specific definitions for each. The definitions are important because protections and access vary depending upon the type of record. State law includes a general definition for “pupil records,” which means all records relating to individual students maintained by a school, with the exception of three specific exclusions discussed in a later section. Within the general category of pupil records, the statutes also identify the following record types:

- **Behavioral records.** Pupil records that include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual student’s behavior, tests relating specifically to achievement or measurement

of ability, the student's physical health records (other than immunization records or lead screening records), law enforcement officer records obtained under specific statutory provisions relating to juveniles and children, and any other pupil records that are not progress records. [s. 118.125 (1) (a), Stats.]

- **Directory data.** Pupil records that include the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received, and the name of the previous school the student most recently attended. [s. 118.125 (1) (b), Stats.]
- **Progress records.** Pupil records that include the student's grades, a statement of the courses taken by the student, the student's attendance record, the student's immunization and lead screening records, and records of the student's school extracurricular activities. [s. 118.125 (1) (c), Stats.]
- **Pupil physical health records.** Pupil records that include basic health information about a student, including immunization records, emergency medical card, log of first aid and medicine administered to the student, athletic permit card, a record regarding a student's ability to participate in an education program, lead screening records, results of routine screening tests (hearing, vision, scoliosis) and any follow-up, and any other basic health information, as determined by the State Superintendent. [s. 118.125 (1) (cm), Stats.]

The Wisconsin statutory definitions of student records differ slightly from definitions found within federal law. FERPA uses certain terms that do not appear in the Wisconsin Pupil Records Law, and vice versa. For instance, FERPA uses the term "education records," which covers several categories of records defined in state law.

Exclusions From the Pupil Records Law

The Wisconsin Pupil Records Law specifically excludes certain records from the definition of "pupil records," meaning that these records are exempt from the general provisions of the law. The definitional exclusions relate to personal notes, psychological treatment, and certain law enforcement records.

The definition of "pupil records" specifically excludes notes or records maintained by a teacher or other person required to hold a DPI license, certificate, or permit, if the records and notes are not available to others. The definition also excludes psychological treatment records, if those records are necessary for the treatment of the student and only available to individuals involved in the treatment. Finally, the definition excludes law enforcement unit records. A law enforcement unit is a specific type of law enforcement entity that is a component of a school district and is authorized by the school board to take certain actions. Rather than treating these law enforcement unit records as "pupil records," a school board must treat them in the same manner that other law enforcement agencies are required to treat records of juveniles. [s. 118.125 (1) (bL) and (d) 1. to 3. and (7), Stats.]

Disclosure of Student Information

The Wisconsin Pupil Records Law generally requires a school district to keep pupil records confidential, but allows for disclosure under various exceptions. Some of the statutory exceptions allow courts to obtain particular student records from a school pursuant to a court order. Others allow law enforcement agencies to obtain student information for particular purposes, such as investigating truancy or criminal offenses. The following section highlights several key exceptions authorizing disclosure of pupil records.

Disclosure to DPI and Public Officers

A school board must provide DPI, upon request, with any information in a pupil record that: (a) is required to determine compliance with statutory requirements under chs. 115 to 121, the statutory chapters relating to education; or (b) relates to an audit or evaluation of a federal- or state-supported program. School boards are also permitted, but not required, to provide any public officer with information the board must maintain under chs. 115 to 121. [s. 118.125 (2) (g), Stats.]

Disclosure to School Employees, Police Liaisons, and School Officials

Pupil records must be available to certain school employees, school officials, and law enforcement officers who have a particular need for that information. The statutes guarantee access to the following specified individuals: (a) school district employees in the district the student attends who are required to be DPI-licensed; (b) law enforcement officers designated by the school board and assigned to the school district; and (c) school officials who the school board determines have legitimate educational interests, including safety interests, in the pupil records. [s. 118.125 (2) (d), Stats.]

Disclosure to Students or Parents

A school district must provide progress records to a student or the parent or guardian of a minor student upon request. A district must also provide an adult student (18 or older) or the parent or guardian of a minor student with behavioral records upon request, as well as the opportunity to review the records with someone qualified to explain and interpret them. [s. 118.125 (2) (a) and (b), Stats.] A school board has the option to disclose personally identifiable information to the parent of an adult student without first obtaining the student's consent, if the student is still a dependent. However, the adult student may inform the school in writing not to do so, which prohibits the school from giving information to the parent. [s. 118.125 (2) (k), Stats.]

Disclosure With Written Permission

An adult student or the parent or guardian of a minor student may give anyone written permission to access a student's records. If such permission is given, a school must provide the authorized person progress records or requested portions of behavioral records. Law enforcement records in possession of the school are not provided unless specifically identified in the written permission. [s. 118.125 (2) (e), Stats.]

Disclosure of Directory Data

Schools may disclose “directory data” to any person if the school first notifies parents of their ability to opt out of such disclosure. The statutory definition of directory data enumerates types of student information such as names, addresses, photos, degrees and awards, and participation in extracurricular activities, among others. However, an individual school designates which of these categories of information it deems “directory data.” An individual school may choose not to designate certain categories as “directory data,” even though it has the option to do so.

A school may disclose directory data without consent if it fulfills the following requirements: (a) notifies parents or legal guardians about which information the school designates as directory data; (b) notifies parents or guardians they have 14 days to inform the school that all or part of the student’s directory data may not be released without prior consent; and (c) allows 14 days for parents or legal guardians to inform the school. [s. 118.125 (2) (j) 1., Stats.]

Disclosure Necessary for Health or Safety

A school board may disclose pupil records if knowledge of the information is necessary to protect the health or safety of any individual. The disclosure may only be made to appropriate parties and in connection with an emergency. [s. 118.125 (2) (p), Stats.]

STATEWIDE STUDENT DATA SYSTEM

State law authorizes the exchange of student data between state agencies and educational institutions for the purpose of improving student academic achievement from preschool through postsecondary education. The law permits DPI, the University of Wisconsin System, the Department of Children and Families, the Department of Workforce Development, the Technical College System Board, and the Wisconsin Association of Independent Colleges and Universities to study and evaluate one another’s education programs pursuant to written agreements. As part of such an agreement, the agencies and educational institutions must commit to protecting student privacy and complying with student data privacy laws. [s. 115.297 (1) (a), (2) and (3) (g), Stats.]

State law also requires the state agencies and educational institutions to create a longitudinal data system of student data linking data from preschool programs to postsecondary education programs. The agencies and educational institutions are permitted to disclose personally identifiable student data to the longitudinal data system, as well as to other agencies or public or private research organizations, if the disclosure is in connection with a data-sharing agreement that fulfills certain requirements. The agreement must require destruction or return of the personally identifiable student data when no longer needed or when the agreement expires. If the disclosure is to a public or private research organization, the agreement must also prohibit personal identification by anyone other than an authorized representative of the organization who has legitimate interest in the information. [s. 115.297 (3) (a) and (4), Stats.]

OTHER STATE LAWS

In addition to the Wisconsin Pupil Records Law and the Statewide Student Data System Law, other state laws that impact student data security and student privacy include the following:

- **Protections for student health records.** State law provides strong protections for health care records, including those in the possession of a school. Student health records that include basic health information about a student (such as an emergency medical card and a log of first aid administered to the student) are “pupil physical health records” and are addressed under the Wisconsin Pupil Records Law. Certain health records in possession of a school do not meet this definition because they contain more detailed health information like medical diagnoses. Such records are “patient health records” and other provisions of state law govern their treatment and confidentiality. [ss. 146.81 to 146.84 and 118.125 (2m), Stats.]
- **School access to law enforcement agency records.** State law requires that law enforcement records of juveniles be kept confidential, but allows public, private, and tribal schools to obtain certain information contained in these records. A school that receives information from a juvenile’s law enforcement records may only disclose it to teachers, to school district employees required to be DPI-licensed, and to other school and district officials determined to have legitimate educational or safety interests in the information or who are designated to receive the information to provide treatment programs to students. [ss. 118.127 and 938.396 (1) (b) 2. and (c) 3., Stats.]
- **Public Records Law.** State law authorizes members of the public to obtain and copy records held by governmental authorities, including school boards, but creates an exception for records exempted from disclosure under state or federal law. The Wisconsin Pupil Records Law and FERPA are state and federal laws that exempt student records from disclosure, and information protected from disclosure under those laws is not subject to disclosure under the Public Records Law. Information that is not protected under the Wisconsin Pupil Records Law, FERPA, or another exception is subject to disclosure pursuant to a public records request. [ss. 19.35 (1) (a) and (b) and 19.36 (1), Stats.] [See also Wisconsin Department of Justice, *Wisconsin Public Records Compliance Guide*, page 24.]
- **Limitations on pupil identification numbers.** State law allows school boards and private school governing bodies to assign unique identification numbers to students, but prohibits numbers that are identical to or incorporate a student’s social security number. [s. 118.169, Stats.]
- **Child welfare agency access to pupil records.** State law allows DPI to disclose information in pupil records to a caseworker or child welfare representative responsible for a child’s care and protection under a Memorandum of Understanding (MOU), if that person is authorized to access the child’s case plan. State law further allows a school board to disclose

information in pupil records to a county department or tribal organization under an MOU in cases where parents do not grant permission for such disclosure. [s. 115.298, Stats.]